Supreme Court, U.S.
FILED

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Nº. _____ 98 400 SEP 2 - 1998

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In The

Supreme Court of The United States

October Term 1997

JAMES HOWARD SMITH, Trustee of the Estates of MARILYN A. HANSON AND LYNNE M. RICE

Petitioner,

v.

LASER, WILSON, BUFORD & WATTS, P.C., SOUTHERN GUARANTY INSURANCE COMPANY; CONTINENTAL CASUALTY INSURANCE CO.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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**Counsel of Record*

APPELLATE ADVANTAGE
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71 pp

QUESTION PRESENTED

1. Whether the requirement that there be an opportunity for a full and fair hearing before collateral estoppel applies prevents the use of a state court dismissal of a negligence count and a state court ruling that there was no insurance coverage as a bar to an action in bankruptcy court by the trustee of the estates of the debtors against the debtors' insurance companies and their previous law firm on the grounds that the motion to dismiss the negligence case was filed by the law firm and the hearing conducted without the knowledge or consent of the debtors.

LIST OF PARTIES

The caption of the case contains the names of all the parties.

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OPINIONS BELOW

The order denying rehearing and rehearing in banc is unreported and is Appendix A. The order of the Eighth Circuit is unreported and is Appendix B. The opinion of the District Court is unreported and is Appendix C.

JURISDICTION

The decision of the United States Court of Appeals for the Eighth Circuit denying rehearing en banc and denying rehearing by the panel was delivered June 4, 1998. This petition is filed within the time allowed by law. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall . . . be deprived of life, liberty or property, without due process of law; . . . .

STATEMENT OF THE CASE

The District Court had jurisdiction under 28 U.S.C. 1334 as the complaint arose under Title 11 or a bankruptcy case. The plaintiff is the trustee in bankruptcy of the estates of Marilyn Hanson and Lynne Rice who brought suit against Laser, Wilson, Buford and Watts P.A. for legal malpractice and against Southern Guaranty Insurance Company and Continental Casualty Insurance Company for refusal to defend a lawsuit filed in state court. The district court denied the trustee's motion for summary judgment and granted Continental's motion to dismiss, Southern Guaranty's motion for summary judgement and the Laser firm's motion for summary judgement leading to the appeal to the Eighth Circuit which affirmed the District Court.

Jerry and Brenda Smith sued Hanson and Rice along with Metcalf and Young in state court for outrage and battery alleging that Hanson and Rice hired Young and Metcalf to break into the home of Jerry and Brenda Smith and beat and rob them. The complaint also alleged in the alternative, negligence in Hanson's and Rice's communicating to Metcalf and Young their hatred for Jerry Smith and desire of physical harm for him. Continental Casualty refused to defend. Southern Guaranty hired the Laser firm to defend which filed a motion to dismiss the negligence count (appendix D hereto). That motion argued that the defendants there had no duty to protect plaintiffs from the criminal acts of third parties. The

response argued that the complaint did not allege that defendants had a duty DDUduty to protect plaintiffs from the criminal acts of third parties but that the defendants were being sued for their own negligence in suggesting an attack. The motion to dismiss the negligence was granted. See pages from the transcript attached as appendix E. The trial proceeded on intentional acts only, resulting in a $3,000,000 verdict which was reduced on remittitur. Thereafter, the trial court entered an order granting summary judgment to the insurance companies on the grounds that the jury had found the acts of defendants there to be intentional and therefore excluded from coverage. That order is appendix F. On appeal, the $3,000,000 verdict was reinstated and the lower court's granting of the dismissal of the negligence count was upheld. Smith v. Hanson,323 Ark. 188, 914 S.W.2d 285 (1996), appendix G.

Hanson and Rice declared bankruptcy and plaintiff was appointed trustee. Plaintiff filed in district court a complaint against the Laser firm for filing the motion to dismiss the negligence count without informing Hanson and Rice that it would destroy their insurance coverage and any chance of a bankruptcy discharge and against the insurance companies for refusal to properly defend.

The defendants filed motions for summary judgment, arguing collateral estoppel resulting from the state trial court's order dismissing the negligence count and an order dismissing the insurance companies as defendants because the jury found

the acts to be intentional. They attached to the motion the affidavit of Tom Diaz (appendix H hereto) to the effect that all motions were done in consultation with the insureds. Your petitioner argued that collateral estoppel should not apply because the debtors on whose behalf the action was filed in bankruptcy court were denied an opportunity of a full and fair hearing, citing Kremer v. Chemical Construction Corp., 456 U.S. 461, 102 S. Ct. 1883, 72 L.Ed.2d 262 (1982). He attached to his response the affidavits of Marilyn Hanson (appendix I hereto) and Lynn Rice (appendix J).

Hanson in her affidavit stated that Diaz never told her and Rice that the dismissal of the negligence count destroyed their coverage and that they did not even know about the motion to dismiss the negligence until two days before trial. She said that no one from the Laser firm discussed the motion until it had already been ruled on and did not ever tell Hanson and Rice what the consequences of the motion's being granted would be. She attached to her affidavit a letter from Diaz in which he admitted a conflict of interest in responding to Southern Guaranty's motion for summary judgment.

Lynn Rice in her affidavit stated that she did not find out about the motion to dismiss the negligence count until two days before trial and that no one from the Laser firm ever discussed the motion with her or told her what the consequences would be. She said Diaz never told her dismissal of the negligence case destroyed their coverage.

The District Court dismissed the complaint on the grounds of collateral estoppel, stating that the trial court and the Arkansas Supreme Court had held that there was not sufficient evidence of negligence and that if there was no negligence, the acts of the Laser firm, Continental Casualty, and Southern Guaranty were proper.

The Eighth Circuit affirmed.

REASONS FOR GRANTING THE WRIT

Clearly the motion was not in the interests of Hanson and Rice but was in the interests of the carrier. It forced the lawyer for the plaintiffs below to argue that the acts were intentional and gave the jury the choice only to find that the acts were intentional or blameless. The duty of a defense lawyer is to find coverage, not frustrate it. Had the negligence count been left in the case and the jury found the acts to be negligent instead of intentional, the judgment would be smaller, insured and dischargeable. The motion was filed without informing the insureds of what the consequences would be on coverage and a bankruptcy discharge and therefore was without informed consent. As a result of the filing of the motion, the negligence count was dismissed and summary judgement granted for the insurance companies. As a proximate result of the Laser firm's actions, Hanson and Rice have a non-dischargeable, uninsured $3,000,000 judgment against them.

Petitioner raised in district court in a timely fashion in response to the motion for summary judgement that collateral estoppel does not apply when the party against whom the earlier decision is asserted did not have the opportunity for a full and fair hearing. Kremer v. Chemical Construction Corp., 456 U.S. 461, 102 S. Ct. 1883, 72 L. Ed. 2d 262 (1982). For issue preclusion the party against whom estoppel is sought must have had a full and fair hearing to litigate the issue in the prior proceeding. NLRB v. Kentucky May Cole Co., Inc. 89 F.3d, 1235 (6th Cir. 1996). When the underlying court may have been misled, collateral estoppel does not apply. Milton S. Kronheim & Co. v. Dist. of Columbia, 91 F.3d 193 (D.C. Cir. 1996). The party against whom estoppel is sought must have been fully represented in the prior action. In re Sullivan, 198 BR 417 (D. Mass. 1996). There must be no circumstances that would render preclusion inappropriate or unfair. FDIC v. Lee, 942 F.2d 255 (E. D. La. 1996).

In Manzanita Park Inc. v. Insurance Company North America, 857 F.2d 549 (9th Cir. 1988), the appeals court ruled that Manzanita was not collaterally estopped from relitigating the issue of coverage because of the conflict of interest in the trial counsel in getting the only insured claim dismissed.

Although your petitioner raised the requirement of an opportunity of a full and fair hearing before collateral estoppel applies, the District Court, in listing the elements of collateral estoppel, left that requirement out. See page eight

of the opinion and page 884 of the Eighth Circuit appendix. The District Court may have been disturbed that the attorney for the bankruptcy trustee was the attorney for plaintiffs in state court. The District Court said at page three, page 879 of the Eighth Circuit appendix:

> Although Lewis represented the Smiths in the underlying state court trial against Hanson, Rice, Metcalf and Young, he now represents Hanson and Rice via their bankruptcy trustee. In effect, Lewis, having won a judgment against Rice and Hanson in state court which has proven to be uncollectible, is now suing the attorneys against whom he tried this case for their handling of that matter against him.

That should not have been a consideration for the District Court or the Eighth Circuit. The District Court and the Eighth Circuit should not be allowed to disregard the decisions of the United States Supreme Court because of the identity of the attorney of the plaintiffs and appellant.

This court should grant the writ for an additional reason. Citizens should know whether a party is being denied the opportunity of a full and fair hearing under Kremer when the attorney who files a motion which is not in his client's interests and conducts the hearing, has conflict of interest and does not have the informed consent of his clients to conduct the hearing.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit.

August 28, 1998

Respecfully Submitted,

R. David Lewis
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(501) 664-0818
Counsel of Record for Petitioner

APPENDICES

United States Court of Appeal
for the Eighth Circuit

No. 97-3294EALR

James Howard Smith, etc.,	*	
Appellant,	*	
	*	Order Denying
vs.	*	Petition for
	*	Rehearing and
Laser, Wilson, Buford & Watts,	*	Suggestion for
P. C., et al.,	*	Rehearing EnBanc
Appellees.	*	

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

June 4, 1998

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk, U. S. Court of Appeals, Eighth Circuit

United States Court of Appeal
for the Eighth Circuit

No. 97-3294

James Howard Smith, Trustee	*	
of the Estates of Marilyn A.	*	
Hanson and Lynne M. Rice	*	
Plaintiff-Appellant,	*	Appeal from the
	*	United States
v.	*	District Court for
	*	the Eastern District
Laser, Wilson, Buford & Watts,	*	Arkansas
P. C.; Southern Guaranty	*	
Insurance Company;	*	[UNPUBLISHED]
Continental Casualty	*	
Insurance Company,	*	
Defendants-Appellees.	*	

Submitted: April 15, 1998
Filed: May 5, 1995

Before LOKEN and LAY, Circuit Judges, and PRATT,[1] District Judge.

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[1]The Honorable Robert W. Pratt, United States District Judge for the Southern District of Iowa, sitting by designation.

PER CURIAM.

Upon review of the overall record, the Findings of Fact and Conclusions of Law made by the District Court, and the briefs filed on appeal in this court, we affirm the judgment of dismissal of the plaintiff's claims based upon the well-reasoned opinion of the District court.

See 8th Cir. R. 47B.

IT IS SO ORDERED.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

JAMES HOWARD SMITH,
Trustee of the Estates of
MARILYN A. HANSON and
LYNNE M. RICE PLAINTIFF

vs. No. LR-C-96-950

LASER, WILSON, BUFORD & WATTS, P.A.,
SOUTHERN GUARANTY INSURANCE COMPANY and
CONTINENTAL CASUALTY INSURANCE COMPANY
DEFENDANTS

ORDER

Presently before the Court are the following notions: (1) Defendant Continental Casualty Insurance Company's ("Continental") Motion to Dismiss (#13), (2) Defendant Southern Guaranty Insurance Company's (SGI) Motion for Summary Judgment (#17), (3) Plaintiff's Motion for Summary Judgment on the Issue of Liability and Compensatory Damages (#31), (4) Defendant Laser, Wilson, Buford & Watts's ("the Laser firm") Motion for Summary Judgment (#33), (5) Defendant SGI's Motion for Oral Argument (#41), (6) Plaintiff's Motion for Oral Argument

(#42), Plaintiff's Motion to Strike Continental's Response (#45), Defendant SGI's Motion for Rule 11 Sanctions (#51), and Plaintiff's Amended Motion for Summary Judgment (#60).[1] For the reasons set forth more fully below, the Court grants Continental's notion to dismiss (#13), SGI's motion for summary judgment (#17), and the Laser firm's motion for summary judgment (#33). The Court denies Plaintiff's motion and amended motion for summary judgment (#31 & #60) and SGI's motion for Rule 11 sanctions (#51).

I. Background

James Howard Smith ("Plaintiff"), the Chapter 7 bankruptcy trustee for the estates of Marilyn A. Hanson ("Hanson") and Lynne M. Rice ("Rice"), brings this suit against the defendants on a number of different theories which arose out of an underlying state court proceeding and which was tried on or about July 20, 1994. In order to understand the basis of Plaintiff's instant complaint, however,

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[1]In order to get to the substance of the notions at issue, the Court denies as moot both Plaintiff's and SGI's notions for oral arguments (#41 & #42). The parties have filed extensive pleadings on these matters, and the Court finds no need to conduct oral arguments on this subject matter. Additionally, the Court denies the Plaintiff's motion to strike (#45). All parties have had a full and fair opportunity to set forth their positions before the Court. Plaintiff will have suffered no prejudice by this Court's allowing Continental's pleading to stand, as it has had ample time to respond and reply to the pleadings filed in this matter.

the Court must review the facts surrounding the state court proceeding.

On the night of July 3, 1992, Jeffery Scott Metcalf ("Metcalf") and Chris Young ("Young") broke into the home of Brenda and Jerry Smith ("the Smiths"). The two men beat and robbed the couple. Subsequently, on June 29, 1993, the Smiths filed a lawsuit against Metcalf and Young in Pulaski County Circuit Court, and the Honorable John B. Plegge presided over the proceedings. After amendments, the Smiths' state court complaint ultimately alleged that Metcalf and Young had committed assault and battery on the Smiths. It further alleged that Hanson and Rice had also committed assault and battery as the two women had hired Metcalf and Young to perform the break-in. The complaint alleged that all four persons had committed the tort of outrage. Alternatively, the complaint alleged that both Hanson and Rice had been negligent in discussing their desire to see the Smiths hurt in the presence of Metcalf and Young.[2] Finally, the complaint sought a declaratory judgment against Continental and SGI as each company had a policy with either Hanson and/or Rice which may have provided coverage in the advent that any judgment against them was founded on the grounds of negligence.

Continental denied coverage to the women and

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[2]Young had only recently been released from the Arkansas Department of Corrections.

refused to provide a defense for them based upon an "intentional act" exemption in its policy. SGI, however, did provide a defense to Hanson and Rice under a reservations of rights. That defense was provided by the Laser firm. Additionally, for part of the proceedings, at least, Hanson and Rice were represented by their personal attorneys, Mr. Dale Adams, Esq. and Mr. Michael LeBoeuf, Esq. SGI was represented by the firm of Barber, McCaskill, Amsler, Jones & Hale ("the Barber firm").

Prior to trial, the Laser firm moved to dismiss the Smith's negligence claim. The Smiths' attorney, Mr. David R. Lewis, Esq. ("Lewis"),[3] opposed the motion by pleading and by oral argument at a pre-trial hearing conducted on the matter. As Judge Plegge considered other materials outside the pleadings, the motion to dismiss was ultimately treated as a notion for partial summary judgment, and he ruled as a matter of law that any comments Hanson and Rice may have made before Metcalf and/or Young were not negligent as no duty or special relationship existed between either Hanson/Rice and the Smiths or Hanson/Rice and Metcalf/Young. Therefore, when the case went to trial, the

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[3]Although Lewis represented the Smiths in the underlying state court trial against Hanson, Rice, Metcalf, and Young, he now represents Hanson and Rice via their bankruptcy trustee. In effect, Lewis, having won a judgment against Rice and Hanson in state court which has proven to be uncollectible, is now suing the attorneys against whom he tried this case for their handling of that matter against him.

possibility that Hanson and Rice had been negligent was not an issue before the trier of fact; only the intentional tort issues were considered by the jury. Ultimately, the jury found Hanson and Rice liable for the intentional torts, and judgment was entered in favor of the Smiths and against Hanson and Rice in the amount of $3,000,000. Following the trial, Judge Plegge granted summary judgment for SGI and Continental regarding their liability for damages based on the intentional acts exceptions in their policies.

Lewis then, as the Smiths attorney, appealed the trial court's dismissal of the negligence claim and its grant of summary judgment in favor of SGI and Continental. Smith v. Hanson, 323 Ark. 188, 914 S.W.2d 285 (1996). The Arkansas Supreme Court wrote extensively on the issue of negligence and determined the trial court had been correct in dismissing the negligence claim. Smith, 323 Ark. at 196-97, 914 S.W.2d at 28990. The Arkansas Supreme Court also affirmed the granting of summary judgment in favor of the two insurance companies. Smith, 323 Ark. at 198, 914 S.W.2d at 290.

Thus, the gravamen of the instant suit is threefold. *First*, Plaintiff alleges that the Laser firm should not have filed the motion for summary judgment which lead to the dismissal of the negligence claim in the first suit. Hanson and Rice contend that seeking the dismissal of the negligence claim operated against their best interests as it eliminated the possibility of any coverage under either of the two insurance

policies. *Second*, Plaintiff contends, among other things, that Continental breached its duty to defend and disregarded the interests of its insureds. *Third*, Plaintiff charges that SGI acted in bad faith toward Hanson and Rice in a number of different ways, including conflicts of interest, refusing to settle within the policy limits, and engaging in oppressive behavior toward its insureds.

II. Summary Judgment Standard

In pertinent part Rule 56(c) states that summary judgment shall be granted if "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The nonmoving party must establish significant probative evidence to prevent summary judgment, and the trial court must give the party opposing summary judgment the benefit of all favorable inferences. Johnson v. Enron Corp., 906 F.2d 1234, 1237 (8th Cir. 1990)(citations omitted). In a trilogy of cases, the Supreme Court has established that summary judgment under Fed. R. Civ. Pro. 56 should be interpreted to accomplish its purpose of disposing of cases which are factually unsupported. These three cases also indicate that the trial judge's function is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Celotex Corp v. Catrett, 477 U.S. 317 (1986); Matsushita

Elec. Indus. v. Zenith Radio Corp., 475 U.S. 574 (1986).[4]

III. Analysis

To put this entire case in perspective at the outset, Plaintiff must, in order to prevail in this suit, relitigate the possibility that Hanson and Rice's actions with regard to the Smiths were negligent. All Plaintiff's allegations against the defendants stem from this simple supposition. Put differently, if Hanson and Rice had acted negligently, instead of intentionally, then Continental would have been contractually obligated to provide them with a defense and coverage. SGI would also have been contractually obligated to provide liability coverage, and the Laser firm would have had to defend against this alternative form of liability.

Unfortunately for Plaintiff, this issue has been fully and fairly adjudicated before two courts previously, and both courts found that the acts of Hanson and Rice did not constitute negligence a s a matter of law. At the trial court level, the court disposed of the negligence issue at a pre-trial hearing based upon the briefs submitted by the parties and upon oral argument of counsel. Just as important, the Honorable Judge John Plegge has submitted an affidavit on behalf of the Laser firm indicating that had Mr. Thomas Diaz,

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[4]As the Court is reviewing materials supplied outside the pleadings in making its determination on these notions, it will treat Continental's notion to dismiss as a notion for summary judgment. See Fed. R. Civ. Pro. 12(b).

Esq. ("Diaz"), trial counsel for Hanson and Rice in the state court proceeding, moved for a directed verdict at the end of the Smiths' case, he would have granted the motion. Further, Judge Plegge states that had Diaz not moved for a directed verdict on the negligence issue, he would have dismissed the negligence allegations on his own motion. Therefore, the negligence issue would not have been before the jury under any circumstances. See Aff. of Honorable Judge John Plegge, Doc. Num. 34,.Ex. A, p. 3.

Additionally, the Arkansas Supreme Court clearly and extensively addressed this issue basing its opinion upon the briefs submitted by the parties. The Arkansas Supreme Court wrote:

> The Smiths and Hansen and Rice fervently maintain that a claim for negligence is present under these facts. The essence of their argument is that Hansen and Rice negligently proclaimed their desire to see Jerry Smith hurt and his property damaged in the presence of a convicted felon, Chris Young, who took their statements seriously and acted on them. Young, according to the negligence theory, perpetrated the crime against the Smiths with Metcalf's help, but absent any agreement with Hansen and Rice or clear direction from them to injure Jerry Smith.

> We must disagree that a bona fide claim of negligence exists. Clearly, no special relationship existed between Hansen and Rice and the Smiths at the time of the beating. The question then becomes whether a special relationship giving rise to a duty to control existed at that time between Hansen and Rice and the two perpetrators of the crime. We fail to see that it did, excluding as we must the contract to beat Smith for $2,000 from our analysis. That leaves only an agreement between the parties to move furniture and a vague mission to follow an EFI employee named Charles George. There is nothing to suggest that Metcalf and Young were employees, agents, or otherwise subject to the control or guidance of Hansen and Rice.

Smith, 323 Ark. at 196-97, 914 S.W.2d at 289-90 (emphasis added). Simply put, this a classic case of collateral estoppel. Collateral estoppel, or issue preclusion, is the doctrine which bars previously adjudicated issues from being reopened. In order for the doctrine to apply, the following elements must be met:

> (1) the issue sought to be precluded must be the same as that involved in the prior litigation; (2) that issue must have been actually litigated; (3) it must have been

determined by a valid and final judgment; and (4) the determination must have been essential to the judgment.

Fisher v. Jones, 311 Ark. 450, 455, 844 S.W. 2d 954, 957 (1993)(citation omitted). All of these elements have been met in the instant litigation. As to the first element, negligence on the part of Hanson and Rice is the issue that Plaintiff seeks to reexamine in the instant suit. Only if the actions of Hanson and Rice are deemed negligent can the Laser firm's actions constitute malpractice of any sort and the actions of the insurance companies constitute breaches of duties they owed their insureds. It is obvious from the motions filed before Judge Plegge and his pre-trial hearing on this matter, as well as the Arkansas Supreme Court's opinion on this matter, that this issue was actually litigated. See Fisher, supra (applying collateral estoppel to bar relitigation of an issue decided in an earlier trial through a pre-trial notion and hearing); Arkansas Dept. of Human Services v. Dearman, 40 Ark. App. 63, 842 S.W.2d 449 (1992)(affirming the application of collateral estoppel to an issue decided in an earlier matter through a pre-trial motion and hearing). As to the third issue, there is no doubt that the actions of the trial court constitute a "valid and final judgment." Further, the trial court's actions were specifically upheld on appeal. Fourth, as is obvious from the language of the Arkansas Supreme Court quoted, supra, the trial court's determination of this issue was essential to the judgment.

As a corollary to the determination that the actions of Hanson and Rice were not negligent, but intentional, neither Continental nor SGI was contractually bound to provide a defense to the women. This position, too, was set out before the trial court and the Arkansas Supreme Court, and subject to collateral estoppel.

Thus, the issues raised by Plaintiff in this action have been specifically addressed in previous litigation, and Plaintiff's instant suit cannot withstand the motions for dismissal and for summary judgment filed on behalf of SGI, Continental, and the Laser firm due to the doctrine of collateral estoppel. Consequently, summary judgment will be entered for Defendants SGI, Continental, and the Laser firm, and against Plaintiff.

For the reasons already discussed, supra, Plaintiff's motion and amended motion for summary judgment are denied as moot. Finally, given the issues Hanson and Rice raised in this suit, the Court determines that an award of any sanctions in this action is inappropriate.

IV. Conclusion

For the reasons stated previously,

1. Continental's Motion to Dismiss (#13) is granted;
2. SGI's Motion for Summary Judgment (#17) is granted;
3. Plaintiff's Motion for Summary Judgment (#31) and Amended Motion (#60) are denied as moot;
4. The Laser firm's Motion for Summary Judgment (#33) is granted;

5. SGIfs Motion for Oral Argument (#4l) is denied;
6. Plaintiff's Motion for Oral Argument (#42) is denied;
7. Plaintiff's Motion to Strike (#45) is denied; and
8. SGI's Motion for Sanctions (#51) is denied.

IT IS SO ORDERED this day 14th of July, 1997.

/s/ Stephen M. Reasoner
UNITED STATES DISTRICT JUDGE

IN THE CIRCUIT COURT
OF PULASKI COUNTY, ARKANSAS
SEVENTH DIVISION

JERRY SMITH and BRENDA SMITH — PLAINTIFFS

v. — No. 93-3929

MARILYN HANSEN, LYNNE RICE — DEFENDANTS
JEFFERY SCOTT METCALF, and CHRIS YOUNG,
SOUTHERN GUARANTY INSURANCE CO., and
CONTINENTAL CASUALTY CO.

SOUTHERN GUARANTY INSURANCE CO.
THIRD PARTY
PLAINTIFF

v.

ELECTRONIC FINDERS, INC. — THIRD PARTY
DEFENDANT

MOTION TO DISMISS PLAINTIFFS'
NEGLIGENCE CLAIM

COME the Defendants MARILYN HANSEN and LYNN RICE, by and through their attorneys, Laser, Sharp,

Wilson, Bufford & Watts, P.A., and for their Motion to Dismiss, state:

1. That this case is set for trial on July 20, 1994.

2. That Claim Three of Plaintiffs Second Amended Complaint attempts to assert a cause of action against Defendants HANSEN and RICE for negligence based upon the intentional criminal acts of Separate Defendants JEFFERY SCOTT METCALF and CHRIS YOUNG.

3. That this claim for negligence against Defendants HANSEN and RICE fails to state a claim upon which relief can be granted since no special relationship' existed between any of the parties that would create the necessary legal duty of care required in order to hold one party responsible for the criminal acts of a third party in a negligence action.

4. That this claim for negligence against Defendants HANSEN and RICE fails to state a claim upon which relief can be granted since HANSEN and/or RICE did not possess the 'special knowledge' that would create the necessary legal duty of care required in order to hold one party responsible for the criminal acts of a third party in a negligence action.

5. That Plaintiffs failed to plead sufficient facts which would create the 'special relationship' or 'special knowledge' required in order to hold one party responsible for the criminal acts of a third party in a negligence claim.

6. That HANSEN and/or RICE did not have any

control over the actions of METCALF and/or YOUNG, therefore, they did not have a 'duty' toward Plaintiffs with respect to METCALF's and/or YOUNG's actions.

7. The determination of whether or not one party has a 'duty' toward another party in a negligence cause of action is a question of law for the court.

8. Defendants HANSEN and RICE rely on the pleadings, HANSEN'S deposition, RICE'S deposition, Rosalyn Young-Lemon's deposition (See exhibits A, B, C of Motion to Dismiss/Bifurcate), METCALF'S deposition (Exhibit D - attached), relevant case law and relevant secondary legal authorities .

WHEREFORE, Defendants HANSEN and RICE pray that the Court dismiss with prejudice Plaintiffs' claim for negligence against Defendants HANSEN and RICE and for all other proper relief to which they may be entitled.

Respectfully submitted,

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Thomas J. Diaz
LASER, SHARP, WILSON,
BUFFORD & WATTS, P.A.
101 S. Spring Street, Suite 300
Little Rock, AR 72201-2488
(501) 174-2981

By: /s/ Thomas J. Diaz

Ark. ID# 94049

CERTIFICATE OF SERVICE

I, Thomas J. Diaz, do hereby certify that a copy of the foregoing was mailed to all attorneys of record a list d below on this /s/1st day of July, 1994.

/s/ Thomas J. Diaz
Thomas J. Diaz

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Court Reporter Transcript
of State Court Proceedings
(Partial)

Hearing in Chambers before Hon. John Plegge
Pulaski County Circuit Court

Case Number 93-3929
July 15, 1995

Hearing on Defendants' Motion to Dismiss Negligence Count

****

MR. CHERRY: Right.

THE COURT: The plaintiff didn't bring them in?

MR. LEWIS: Right. Then that leaves Tom's motion to dismiss, plaintiff's negligence.

THE COURT: That causes me some concern. It is statements that you make to someone else that are negligent that have caused something else to happen out of this, is that what you are saying?

MR. LEWIS: Right. Yes, sir. originally, it was for battery and outrage, because I was thinking, when I read the police report, you know, like everybody else in the criminal trials, in that the most probable thing would be they hired these guys to do it. When you look at their statements and

take their depositions they say, well, we didn't hire them but we made these statements like we would like to see harm to them, and all of these things were in my brief, tires slashed, property damages, but they keep saying, we said all these things but we didn't say we gave them money. So what I am saying is if Hanson and Rice are telling the truth they are at least negligent for making those kinds of statements to a felon.

My personal belief is they hired him to do it but you don't know if they are going to believe Chris and Scott or Marilyn and Lynn. So I am saying that if you make a statement, you know, that I would like to see that guy whipped and somebody goes and does it, that has been working for you, I am saying that is at least negligence.

THE COURT: And that is a real stretch, isn't it, Mr. Lewis?

MR. LEWIS: I don't think so. If somebody said, you know, let's say that Scott and Chris' statements are correct, that these women said, I would give $2,000 to have those people beat up and let's say there was a meeting of the minds, let's say the jury finds that those statements were made but there was a miscommunication as to whether they really were hired, and somebody said, I would give $2,000 to have those people whipped and the people that listened to it thought that there was a deal, that the people who made that statement didn't think they made a deal, they don't think they have hired these people, that maybe the most probable thing that really

happened is that there wasn't a meeting of the minds so these criminals go out and break into their house and tie them up and beat them up and if at least it is not an intentional crime of hiring somebody it is at least negligence by engaging in that conversation. Plenty of evidence of all sorts of malicious comments by people that, we don't like them, we want them hurt, tied up, beat up, you know. And Marilyn and Lynn admit a good bit of that but they say they didn't hire these guys to do anything.

MR. DIAZ: The evidence will be disputed as to how much they said and who they said it in front of.

MR. LEWIS: Right. And, say, the jury thinks if the truth falls somewhere between there and finds the statements were in fact made, I will give you $2,000 to whip this guy, and it turns out the ladies didn't think they had made a deal, and the jury finds out there wasn't a meeting of the minds and no real contract for the assault there, it is not relevant.

THE COURT: I am going to rule that it is not negligence. That may be a lot of other things but I don't think that is negligence.

MR. ALEXANDER: Your Honor, if that is the case I would ask you to take a look at the motion for summary judgment. You have just ruled the negligence count is out and then the insurance company should go home.

THE COURT: I will look at it but I am going to give him an opportunity to respond to it. He just filed it yesterday. They have ten days to respond.

MR. ALEXANDER: I understand, Your Honor.

THE COURT: I can see what you are talking about, Mr. Lewis, but I don't think that rises to what the Court sees as negligence.

MR. LEWIS: You don't think it is reckless?

THE COURT: Reckless, yes, but negligent is the failure to do something that a reasonably careful person should do or doing of something that a reasonable careful person would not do, and these are just reckless statements made.

MR. LEWIS: Real reckless is a higher burden than negligent. And there is also another side to that, Your Honor. Everybody testifies that all of the comments about harm, I want these people harmed, hurt, he has a bad back, all of those comments were made by Lynn, one of the defendants. Also, nobody has testified that Marilyn said anything, but, I wouldn't mind seeing his tires slashed or something to that effect. She never suggested that he have physical harm.

I am saying she would be negligent for being there and listening to her sister's conversation with these guys about hiring somebody to do harm to Jerry Smith and not doing something about it or standing up and saying something when she is at least a passive party to it and not trying to stop it.

THE COURT: Well, I just can't see that. You have made your record and you may well have a good point to appeal on that basis, but your lawsuit is going to be getting the jury mad at these people for making the statement and to

do that you are going to have to show that they did it with intent. I don't see the negligence at all except to get to the insurance companies. I understand why you are doing that.

MR. LEWIS: Well, Marilyn didn't make the statement to hurt anybody. She never said she wanted to see these people hurt.

THE COURT: How is she negligent?

MR. LEWIS: She did say she would like the tires slashed but she didn't say anything in that conversation with Chris and these two guys and her sister to say, I think it is a bad idea, I don't want to be a part of this, and I don't want to see these guys hurt.

THE COURT: You don't have a duty to say that.

MR. LEWIS: I think you do.

THE COURT: All right, that gives you basis for appeal. What else can I do for you? Everybody going to be ready for trial, not everybody, but the plaintiff and the defendants that are left in it? All right.

(Thereupon, the hearing was concluded.)

BEST AVAILABLE COPY

IN THE CIRCUIT COURT
OF PULASKI COUNTY, ARKANSAS
SEVENTH DIVISION

JERRY SMITH and BRENDA SMITH — PLAINTIFFS

v. — No. 93-3929

MARILYN HANSEN, LYNNE RICE — DEFENDANTS
JEFFERY SCOTT METCALF, and CHRIS YOUNG,
SOUTHERN GUARANTY INSURANCE CO., and
CONTINENTAL CASUALTY CO.

SOUTHERN GUARANTY INSURANCE CO.
THIRD PARTY
PLAINTIFF

v.

ELECTRONIC FINDERS, INC. — THIRD PARTY
DEFENDANT

ORDER GRANTING
MOTION FOR SUMMARY JUDGMENT TO
SOUTHERN GUARANTY INSURANCE CO. AND
CONTINENTAL CASUALTY CO.

This case came on for or a hearing on the motions of

Southern Guaranty insurance Co. and Continental Casualty Co. for or summary judgments and the Court, having considered the briefs, arguments of counsel, and being fully advised, finds as follows:

1. This Court has jurisdiction of the parties and the subject matter of the summary judgment action.

2. On July 14, 1994, Southern Guaranty Insurance Co. filed a motion for partial summary judgment and a supporting brief. On July 15, 1994, Continental Casualty Co. made a motion in open court to adopt the motion for summary judgment of Southern Guaranty Insurance Co.

3. On July 20, 1994, Jerry Smith and Brenda Smith were awarded damages against Marilyn Hansen and Lynne Rice in the amount of $3.15 million on theories of assault, battery and outrage.

4. The policies of insurance issued by Southern Guaranty Insurance Co. and Continental Casualty Co. specifically exclude coverage for bodily or property damage expected or intended by the insured.

5. Assault, battery and outrage require an element of intent and the jury made specific findings that the defendants acted intentionally to cause the injury to the plaintiff.

6. The complaint of the plaintiffs against Southern Guaranty Insurance Co. and Continental Casualty Co. seek to recover for damages which are specifically

excluded.

7. There being no dispute of material fact, Southern Guaranty Insurance Co. and Continental Casualty Co. are entitled to judgment as a matter of law.

WHEREFORE, the complaint of the plaintiffs as to Southern Guaranty Insurance Co. and Continental Casualty Co. are dismissed with prejudice. All cross-claims, counterclaims and third party complaints are dismissed without prejudice.

/s/ John B. Plegge
CIRCUIT JUDGE
DATED: 8-24-94

APPROVED:
BARBER, McCASKILL, AMSLER, JONES & HALE, P.A.
By: /s/ Scott Strauss
Scott Strauss
Attorneys for Southern Guaranty Insurance Co.

WRIGHT, LINDSEY & JENNINGS
By: /s/ James M. Moody
James M. Moody
Attorneys for Continental Casualty Co.

SUPREME COURT OF ARKANSAS

No. 95-315

JERRY SMITH AND BRENDA SMITH, APPELLANTS,	APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT,
v.	No. CIV 93-3929 HON. JOHN B.
MARILYN HANSEN, LYNNE RICE, JEFFERY SCOTT METCALF, CHRIS YOUNG, SOUTHER GUARANTY INSURANCE COMPANY, AND CONTINENTAL CASUALTY COMPANY, APPELLEES,	PLEGGE, JUDGE, AFFIRMED IN PART; REVERSED IN PART AND REMANDED

ROBERT L. BROWN, Associate Justice

Appellants Jerry Smith and Brenda Smith, his wife, appeal on several bases but primarily from an order dismissing their negligence claim against the appellees Marilyn Hansen and Lynne Rice and from a remittitur order reducing their verdict for compensatory damages against Hansen and Rice from $250,000 to $100,000. Hansen and Rice, as appellees, assert as a cross-appeal the same point

urged by the Smiths -- that it was error for or the trial court to dismiss the Smiths' negligence claim. In addition, they argue on cross-appeal that the trial court erred in not granting them a new trial and in allowing the outrage claim and the issue of punitive damages to go to the jury. We affirm the trial court's dismissal of the negligence claim and its rulings on the other matters at issue, but we reverse the order of remittitur.

The facts of this case arise out of an allegation by the Smiths that Hansen and Rice contracted with appellees Jeffery Scott Metcalf and Chris Young to rob and beat the Smiths. According to the testimony at trial, Jerry Smith once worked for Hansen and Rice as a salesman of medical supplies at their business known as Electronic Finders Incorporated ("EFI") in Little Rock. In order to enhance his income, Smith decided to leave EFI and set up his own medical supply firm called Sources Inc. EFI sued Smith for violation of a non-compete agreement in September 1991, and the case was settled in April 1992.

During the early morning hours of July 3, 1992, Jerry Smith was awakened in his bedroom by a flashlight in his face. He was struck four or five times by the flashlight. He fell out of bed, and the intruder placed the barrel of a pistol behind his right ear and threatened to "blow [Smith's] head off" if Smith looked at him or tried anything. The intruder accused Smith of sleeping with the intruder's sister which Smith denied, and he then accused Smith of cheating on Smith's business partner. He added that the business partner

told him to collect $500 from Smith.

The intruder next changed his story and told Smith that the business partner offered him $500 to hurt Smith. He added that he was going to meet Smith's business partner that day, but Smith knew this to be a lie because his partner was in the hospital for bypass surgery. His wife, Brenda, was grabbed around the neck and hit two or three times. She was threatened with rape and became hysterical. The intruder asked where the guns and jewelry were located, but determined that there were no guns. He apparently decided against taking the jewelry.

A second intruder was present for part of the beating, and he assisted in tying up Smith and his wife. Smith suffers from a degenerative disc disease, and the first intruder said that he knew Smith had a bad back. He then kicked Smith in the small of his back. The first intruder repeatedly asked for more money and eventually took approximately $250 from the Smiths and Jerry Smith's pick-up truck as well. The truck was later recovered in Boyle Park in Little Rock. As a result of the incident, the Smiths have difficulty sleeping and have sought counseling.

Following the attack, Jerry Smith told investigators from the Little Rock Police Department about Hansen's and Rice's dislike for him. After being contacted, Hansen and Rice cooperated with the police and led them to appellees Young and Metcalf. Young and Metcalf were subsequently arrested and prosecuted for robbery. Metcalf pled guilty and

received probation. At the ensuing criminal trial for Young, the Smiths and Metcalf testified, as did Hansen and Rice under promise of immunity. The trial court dismissed the charges against Young due to lack of evidence corroborating the testimony of co-conspirators. On appeal by the State, this court declared that the trial court erred in dismissing the charges. *See State v. Young*, 315 Ark. 656, 869 S.W.2d 691 (1994).

On June 29, 1993, the Smiths filed this lawsuit and alleged assault and battery against Hansen, Rice, Young and Metcalf. The complaint was later amended to include the tort of outrage and negligence. In their second amended complaint, the Smiths sought a declaratory judgment against appellees Southern Guaranty Insurance Company and Continental Casualty Company, both of which insured Hansen and Rice for acts of negligence related to their business. The declaratory judgment was for the purpose of determining whether the acts complained of comprised negligence. Prior to trial, counsel for Hansen and Rice moved to dismiss the Smiths' negligence claim, and the trial court granted the motion.

At trial, Scott Metcalf testified that he grew up with Chris Young and that the two men visited the EFI offices on occasion to see Young's sister, Rosalyn Lemons, who worked for Hansen and Rice. Metcalf stated that Hansen and Rice hired Young and him for $60 each to move their business furniture to a different location. They also hired the two men

to follow an employee, Charles George, to determine whether he was doing business with a competitor. Metcalf further testified that Hansen and Rice "wanted something done" to Jerry Smith. He stated that Rice wanted Smith to have his arm or leg broken and that Hansen wanted damage done to Smith's vehicles by slashing the tires or breaking the windows. Rice, he said, did most of the talking when they discussed the matter. They were told that Smith had a bad back. Metcalf and Young agreed to do what the women wanted for $2,000. Rice then gave them Smith's address.

Metcalf described to the jury how Young and he broke into the Smith residence through an open window. He stated that Young went through Brenda Smith's purse and that he tied up the Smiths on Young's instructions. He added that though he was not present when it happened, it looked like Young had beaten Smith with the flashlight. The two men took Smith's truck and abandoned it at Boyle Park. A few days later, Young and Metcalf met Hansen and Rice at a Wal-Mart store in Little Rock and received $50, according to Metcalf. A week after that, Young received another $100 from the two women. A meeting was set up at Denny's restaurant where the two men expected to receive the balance of the $2,000 owed to them. When Hansen and Rice went to supposedly retrieve the money from the trunk of their car, Young and Metcalf were arrested by undercover police. Metcalf stated that he agreed to the contract beating because he was financially strapped, and he denied that there was any

misunderstanding about what Hansen and Rice wanted done to Smith.

Rosalyn Lemons testified that she worked for Hansen and Rice for two years as a receptionist and that the two women wanted to get even with Smith for going into competition against them. Lemons testified that she heard Rice say in front of Hansen "just one karate chop to the back would do it." Lemons also remembered that Rice asked Young whether he would hurt someone for money.

Lynne Rice admitted at trial that she had given Smith's former address to Young but stated that Young told her about the beating and robbery after the fact and then demanded money. Marilyn Hansen told the jury that she did not like Smith and wanted his vehicle damaged, but she denied that she offered anyone payment to do this. She admitted that Smith's competition was hurting EFI, and that EFI ultimately went bankrupt. She met Young at Wal-Mart after the beating and robbery, saw Smith's drivers license in Young's possession, and gave Young $100 to get his car fixed. She testified that she offered the money as a prepayment for help in moving office furniture during the upcoming week. She further testified that she told the two men at the meeting at Wal-Mart that there had been a big misunderstanding. Afterwards, she sought legal advice which resulted in her cooperation with the police.

Chris Young testified that he had previously been convicted of theft of property and theft by receiving and had

served time in prison. His probation was revoked because of the Smith beating, but the criminal charges were dismissed against him, as has been already discussed. He stated that Hansen and Rice, who knew he had a record, hired the two men to move their offices and follow Charles George. He further testified that Rice "wanted Smith slowed down physically." At trial, he denied giving the women a definite price to do the beating and denied actually participating in it. This testimony contradicted his deposition in which he testified that Rice promised him $2,000 for the job. That deposition was used to impeach Young's testimony at trial. He admitted that he was told that a karate chop to Smith's back "would be a good idea."

The jury found that Hansen and Rice through their agents committed battery and outrage against the Smiths and awarded each of them $250,000 in compensatory damages and $500,000 in punitive damages against Rice and against Hansen, for a total award of $3,000,000. The jury further awarded each of the Smiths $25,000 in compensatory damages and $50,000 in punitive damages against Young and $1 in compensatory damages and $1 in punitive damages each against Metcalf. On motion by Hansen and Rice for remittitur, the trial court reduced each compensatory award from $250,000 to $100,000. Following the trial, the trial court also granted summary judgment in favor of Southern Guaranty and Continental Casualty on the basis that the jury found that Hansen and Rice acted intentionally and

intentional conduct was expressly excluded from coverage.

The Smiths now appeal and primarily urge that the dismissal of the negligence claim and the order of remittitur were error. We note that Hansen and Rice filed the first notice of appeal and the Smiths filed a notice of cross-appeal, which was timely and appropriate. The Smiths, however, lodged the record and assumed the role of primary appellants while Hansen and Rice filed briefs styled as appellees and then raised new issues as cross-appellants. Though this role reversal is highly unusual, we observe no prejudice to the parties, and we will address the points raised on the merits.

I. Dismissal of the Negligence claim

The Smiths mount three arguments in their appeal, all of which can be subsumed under the heading of "negligence" because they deal with dismissal of the negligence claim, refusal to instruct the jury on negligence, and summary judgment in favor of the insurance companies. Hansen and Rice successfully moved to dismiss the negligence claim before the trial court, but now also contend that the dismissal was error by the trial court. This, of course, they cannot do. They prevailed below and are bound by the trial court's decision in their favor. *See Walker v. Kazi*, 316 Ark. 616, 875 S.W.2d 47 (1994). We will not consider their arguments on this point on appeal.

Appellees Southern Guaranty and Continental Casualty urge that the dismissal of the negligence claim was

appropriate because Hansen and Rice owed no legal duty to the Smiths and further that the trial court did not err in granting summary judgment in their favor. The critical factor underlying the parties' positions is that the insurance policies will cover damages resulting from negligence of Hansen and Rice where that is not the case for intentional torts.

The trial court dismissed the negligence claim but in doing so considered matters outside of the pleadings, including depositions of the parties, which converted the motion into one for summary judgment. *See* Ark. R. Civ. P. 12 (b); *First Commercial Trust Co. v. Lorcin Eng'g, Inc.*, 321 Ark. 210, 900 S.W.2d 202 (1995). With that in mind, we turn to the central issue which is whether Hansen and Rice owed a duty of care to the Smiths. If no duty of care is owed, the negligence count is decided as a matter of law, and summary judgment is appropriate. *See First commercial Trust Co. v. Lorcin, supra.*

We have held that ordinarily one is not liable for the acts of another party unless a special relationship exists between the tortfeasor and the. victim -- in this case, between Hansen and Rice on the one hand and the Smiths on the other. *First Commercial Trust Co. v. Lorcin, supra; Bartley v. Sweetser,* 319 Ark. 117, 890 S.W.2d 250 (1994); *Keck v. American Employment Agency, Inc.*, 279 Ark. 294, 652 S.W.2d 2 (1983). Moreover, in our analysis we further examine whether a special relationship exists between the actor (Hansen and Rice) and the third party (Metcalf and

Young) which imposes a duty on the part of the actor to control the third party's conduct. *Id.* This is in accordance with the Restatement of Torts which reads:

> There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless
>
> (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or
>
> (b) a special relation exists between the actor and the other which gives to the other a right to protection.

Restatement (Second) of Torts § 315 (1965).

The Smiths and Hansen and Rice fervently maintain that a claim for negligence is present under these facts. The essence of their argument is that Hansen and Rice negligently proclaimed their desire to see Jerry Smith hurt and his property damaged in the presence of a convicted felon, Chris Young, who took their statements seriously and acted on them. Young, according to the negligence theory, perpetrated the crime against the Smiths with Metcalf's help, but absent any agreement with Hansen and Rice or clear direction from them to injure Jerry Smith.

We must disagree that a bona fide claim of negligence exists. Clearly, no special relationship existed between Hansen and Rice and the Smiths at the time of the beating.

The question then becomes whether a special relationship giving rise to a duty to control existed at that time between Hansen and Rice and the two perpetrators of the crime. We fail to see that it did, excluding as we must the contract to beat Smith for $2,000 from our analysis. That leaves only an agreement between the parties to move furniture and a vague mission to follow an EFI employee named Charles George. There is nothing to suggest that Metcalf and Young were employees, agents, or otherwise subject to the control or guidance of Hansen and Rice.

This is markedly different from the case of *Keck v. American Employment Agency, Inc., supra*. In *Keck*, the employment agency sent a customer, Stacey Keck, to interview with a prospective employer, Joiner, who raped her. In that case, we based our decision in part on the degree of control the agency had over Joiner, which could have been exercised by the agency's making further checks on him. In the instant case, there was no comparable or analogous business relationship between Hansen and Rice and the Smiths which involved Metcalf and Young. We conclude that no such relationship existed among the parties under these facts.

Nor do we view this as a matter where Hansen and Rice induced or encouraged tortious behavior by Metcalf and Young against the Smiths, as we held to be the case in *Cobb v. Indian Springs, Inc.*, 258 Ark. 9, 522 S.W.2d 383 (1975). See also Restatement (Second) Torts § 876 (1979). In *Cobb*,

a security guard for an Indian Springs mobile home park asked a 16-year-old to demonstrate the speed of his car through the park which resulted in injury to a young girl who was hit by the car. We held that a jury question was presented in the case and observed that the security guard in a position of authority and was held in respect by the young people of the park, which could have influenced and encouraged the teenager to demonstrate the speed of the car. We view that consideration as analogous to the tortfeasor's having some control over the third party who causes the injury and, again, to be a factor which is absent in the case before us. Nor do we view the testimony of Hansen and Rice, if you eliminate the contract, as constituting an inducement or encouragement to beat the Smiths, or even a suggestion that they do so.

In short, we agree with the trial court that this case presented a cause of action of intentional tort premised on a contract to beat but not a cause of action for negligence. Without the existence of some special relationship, or evidence of encouragement to third parties by one in a position of some control or authority over them, no duty of care flowed from Hansen and Rice to the Smiths. Offhand statements of dislike to a third party cannot constitute negligence in the absence of such a relationship. We hold that the trial court appropriately granted summary judgment on this issue.

II. Outrage

For their second point, the Smiths assert that the trial court erred in refusing to modify the outrage instruction, AMI 404. Specifically, they urge that extreme mental anguish beyond what a reasonable person is expected to endure as set out in AMI 404 is an impossible standard to meet.

The Smiths have no standing to make this argument. The trial court instructed the jury on the tort of outrage using AMI 404, and the jury returned a verdict in favor of the Smiths on this claim. As the prevailing party, the Smiths cannot now contend that AMI 404 should have been given in modified form. *See Walker v. Kazi, supra; Bynum v. Savage*, 312 Ark. 137, 847 S.W.2d 705 (1993). This point is meritless.

III. Remittitur

We turn next to the Smiths' argument that the trial court erred in reducing the verdict awards from $250,000 to $100,000. We have held that a trial court may not substitute its judgment for the jury's when there is a basis in the evidence for the award and when there is no evidence, appropriately objected to, which tends to create passion or prejudice. *McNair v. McNair*, 316 Ark. 299, 870 S.W.2d 756 (1994); *Morrison v. Lowe*, 274 Ark. 358, 625 S.W.2d 452 (1981). We review the issue of remittitur *de novo* and determine whether the amount of the judgment shocks the conscience of this court. *Id.*

In this case, the trial court made no finding that the jury award was the result of passion or prejudice (*see* Ark. Code Ann. § 16-64-123 (1987)), and we conclude that the compensatory damages awarded do not shock the conscience of this court. What is at issue here is an assault and battery which took place during the dead of night when the Smiths were in bed in their home. Jerry Smith was roused from his bed, beaten, and threatened with a pistol, and Brenda Smith was threatened with rape and choked. Both Smiths were tied up. The experience was unquestionably and understandably traumatic and cause for considerable mental anguish. Under these facts, we do not find the jury award of $250,000 as compensatory damages for each Smith against Hansen and Rice to be unconscionable. The remittitur order is reversed, and the matter is remanded with directions to reinstate the original verdicts of $250,000.

IV. Cross-Appeal

Hansen and Rice raise several issues in their cross-appeal, none of which has merit. They allege, initially, that the trial court erred in not granting them a new trial based on the excessiveness of the verdict. The standard of review for the denial of a motion for new trial is whether the verdict was supported by substantial evidence. *Davis v. Davis*, 313 Ark. 549, 856 S.W.2d 284 (1993); *Scott v. McClain*, 296 Ark. 527, 758 S.W.2d 409 (1988). Metcalf's testimony alone easily constitutes substantial evidence of agency, battery, and

virulent conduct on the part of Hansen and Rice. As already discussed, evidence justifying considerable compensatory damages for mental anguish abounds, and the punitive damages do not strike this court as excessive. The trial court did not err in denying the motion.

Hansen and Rice next argue that the trial court was in error in permitting the issue of punitive damages to go to the jury. They particularly disagree with the large discrepancy between the punitive damages assessed against them and the damages assessed against Metcalf and Young. There is no set standard for measuring punitive damages, and the calculation of those damages lies within the discretion of the jury after due consideration of all the attendant circumstances. *Cater v. Cater*, 311 Ark. 627, 632, 846 S.W.2d 173 (1993). The penalty must be sufficient to deter similar conduct on the part of the same tortfeasor, and it should be sufficient to deter others who engage in similar conduct. *Id.* The jury is free to consider the extent and the enormity of the wrong, the intent of the parties, and the financial and social standing of the parties. *McNair v. McNair, supra.*

Rice and Hansen point out that no evidence was presented on their financial condition. They complain that they were prejudiced because, with no evidence in the record, the jury was free to assume that they could afford to pay a sizable punitive judgment, which they cannot. The Smiths respond that no showing of financial condition is required, and they emphasize the varying degrees of culpability to

justify the discrepancy in the awards. We note that the outrage claim was directed only at Rice and Hansen, and further that Metcalf was the least culpable in that he did not strike the Smiths. He also testified on their behalf. The trial court did not err in submitting the issue of punitive damages to the jury.

Hansen and Rice further argue that a 1991 U.S. Supreme Court opinion requires a remand in this case on the issue of punitive damages. In *Pacific Mutual Life Ins. Co v. Haslip*, 499 U.S. 1 (1991), the Court analyzed Alabama's law on punitive damages and observed that it has more than once approved the common law approach for assessing punitive damages. *Haslip*, 499 U.S. at 15. However, the Court did allude to the fact that due process considerations may come into play when unlimited jury discretion leads to extreme results in the punitive damages award. With general concerns of reasonableness in mind, the court held that the award in that case did not violate the Due Process Clause of the Fourteenth Amendment.

Our law, as evidenced by AMI 2217, is like Alabama's and does not provide for unlimited jury discretion. Punitive damages, under AMI 2217, are awarded for deterrence and retribution purposes. AMI 2217 also instructs the jury that the imposition of punitive damages is not mandatory. We find no grounds for a remand on the basis of the *Haslip* decision. *See J.B. Hunt Transport, Inc. v. Doss*, 320 Ark. 660, 899 S.W.2d 464 (1995).

Finally, Hansen and Rice contend that the trial court erred in permitting the jury to even consider a verdict on the tort of outrage. They submit that there was no evidence to support the finding that their conduct was so outrageous and extreme as to be regarded as atrocious and utterly intolerable. Again, they submit that their conduct was negligent at best. They implore this court to remand the case with the tort of outrage claim removed. We disagree. Substantial evidence was introduced to satisfy the elements of the tort of outrage by means, primarily, of Metcalf's testimony which established a contract beating instigated by Hansen and Rice.

Hansen and Rice further urge that a general verdict amount renders it impossible to know whether the jury award was based on battery or outrage. Because we do not consider submission of the outrage count to the jury to be error, this point presents no basis for reversal. In addition, we have held that the time to object to any irregularity in the verdict form is prior to the discharge of the jury. *P.A.M. Transp., Inc. v. Arkansas Blue Cross and Blue Shield*, 315 Ark. 234, 868 S.W.2d 33 (1993); *Wal-Mart Stores, Inc. v. Kelton*, 305 Ark. 173, 806 S.W.2d 373 (1991). Hansen and Rice raised no objection to the verdict forms either before or after the verdict was rendered.

Affirmed in part. Reversed in part and remanded.

Glaze, J., not participating.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

JAMES HOWARD SMITH, TRUSTEE
OF THE ESTATES OF MARILYN A.
HANSEN AND LYNNE M. RICE PLAINTIFF

vs. NO. LR-C-96-950

LASER, WILSON, BUFFORD & WATTS, P.A.,
SOUTHERN GUARANTY INSURANCE
AND CONTINENTAL CASUALTY INSURANCE
COMPANY DEFENDANTS

AFFIDAVIT OF THOM DIAZ

Comes the affiant, Thom Diaz, who, having been duly sworn, states on oath as follows:

1. I have personal knowledge of all facts set forth in this Affidavit.

2. I am employed by the law firm of Laser, Wilson, Buff ord Watts, P.A.

3. I participated in the defense of Marilyn Hanson and Lynne Rice at the trial level in the case of *Smith. et ux. v. Hanson. et al.*, 323 Ark. 188, 914 S.W.2d 285 (1996).

4. No representative of Southern Guaranty

Insurance Company provided instructions or directions in the manner in which I or this firm was to defend Ms. Hanson and Ms. Rice.

5. No representative of Southern Guaranty Insurance Company played any role in the defense strategy employed in the defense of Ms. Hanson or Ms. Rice such as what motions were to be filed and what witnesses were to be called. All such decisions were made by members of the firm of Laser, Wilson, Bufford & Watts, P.A., following consultation with Ms. Hanson and Ms. Rice.

6. Neither I nor any member of Laser, Wilson, Bufford Watts, P.A., provided legal advice to or represented Southern Guaranty Insurance Company in the matter of Smith, et ux. v. Hanson, et al. Throughout our representation of Ms. Hanson and Ms. Rice, the firm of Laser, Wilson, Buff ord & Watts, P.A. , represented the interests of Ms. Hanson and Ms. Rice without regard to the interests of Southern Guaranty Insurance Company.

Further, affiant saith not.

/s/ Thom Diaz
THOM DIAZ

STATE OF ARKANSAS)
) ss.
COUNTY OF /s/ Pulaski)

SUBSCRIBED AND SWORN to before me, a notary public, on this 17th day of January, 1997.

/s/
NOTARY PUBLIC

My Commission Expires:
12/23/2002

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

JAMES HOWARD SMITH, TRUSTEE
OF THE ESTATES OF MARILYN A.
HANSEN AND LYNNE M. RICE PLAINTIFF

vs. NO. 96-950

LASER, WILSON, BUFFORD & WATTS, P.A.,
SOUTHERN GUARANTY INSURANCE
AND CONTINENTAL CASUALTY INSURANCE
COMPANY DEFENDANTS

AFFIDAVIT OF MARILYN HANSON

On March 11, 1994, Richard Watts wrote me a letter that he had been retained by my insurance company to represent me. Thereafter, Tom Diaz wrote me wanting to discuss our trial. Substantially before trial, I gave Tom Diaz the names of three witnesses, Karen Fletcher, Steve Henry and Debbie Baker, who would have testified that the comments were made by us and everybody that worked for us many times and in front of lots of people, but were made in jest or at least without the intent to hire anybody to do anything to Jerry Smith.

Two days before the trial Tom Diaz told me he would be trying the case himself without Richard Watt. I said I wanted Dale Adams called back in and he said, no, that he felt comfortable doing it himself because he didn't think the plaintiffs had a case. Nobody ever told me we had a right to separate counsel at the expense of the insurance company.

The only witness Diaz put on was me and he had not even discussed my testimony with me prior to trial. The law clerk for Diaz was there and said after the trial she was surprised Diaz didn't put on a defense.

I never talked to Richard

I didn't hire or request Chris Young or Scott Metcalf to hurt Jerry or Brenda Smith.

Tom Diaz knew that Chris Young and Scott Metcalf worked for us from time to time moving furniture, picking up lunch, or going to the post of office. We hired Chris to go to Conway and follow Charlie George. We paid them in cash. We knew Chris had just gotten out of jail. Tom Diaz knew all of this because we told him. Metcalf and Young had no other income at the time and Diaz knew this.

No one from the Laser Firm interviewed us before our depositions or told us why Mike Alexander at the Barber Firm was at our depositions.

At the trial we thought we still had coverage and when the jury came in at one and one-half million each we still thought it would be covered because we had one million dollars coverage each and one million for the business. Diaz

never told us that the dismissal of the negligence case destroyed our coverage. We didn't find out about the motion to dismiss the negligence count until two days before trial. Neither Diaz or anyone from the Laser Firm discussed the motion with us until it had already been ruled on nor did they ever tell us what the consequences of the motion being granted would be. After our trial Diaz wrote me that he could not oppose the motions for summary judgment that was filed by Southern Guaranty on the issue of coverage because it would be a conflict of interest because Southern Guaranty paid for the defense. See letter of August 2, 1994 attached.

We were not in control of our own case. We asked that he take the depositions of Karen Fletcher and Debbie Baker but he wouldn't interview them or take depositions of them or subpoena them.

Diaz asked the same question at the trial of Metcalf that he did at the deposition, that didn't he think that my sister and I ruined his life, and Metcalf gave the same explosive answer, that no, he was grateful, because after his arrest he was baptized and is now closer to the Lord.

We never said to anybody in deposition or at trial or elsewhere that we hired Young or Metcalf. Neither Young or Metcalf testified that they had been hired. Chris and Scott testified only that Lynn Rice asked Chris what he would charge to beat up Jerry Smith and that Chris responded with two thousand but there was no response by Lynne or further conversation by Chris. Both Lynne and I denied the question

and answer ever occurred.

Neither Southern Guaranty or CNA ever interviewed us or took our statements.

/s/ Marilyn Hanson

Sworn before me this 10 day of March, 1997.

/s/ RDL
R. David Lewis

My commission expires 10/15/00

August 2, 1994

Marilyn Hansen
Lynne Rice
LLAMA Wholesale Drug Company
7509 Cantrell Road, Suite 227
Little Rock, AR 72207-2537

Re: Response to Southern Guaranty's Supplemental Motion For Summary Judgment

Dear Marilyn and Lynne:

Enclosed please find a copy of the supplemental brief in support of Southern Guaranty's Motion for Summary Judgment as well as Plaintiffs, response. In this motion, Southern Guaranty is asking the court to find that there is not any insurance coverage for the verdict that was rendered on July 20, 1994.

Because Southern Guaranty paid for your defense under a reservation of rights, it is a conflict of interest for us to respond to this supplemental motion. As you can see, the brief and motion were also sent to your personal attorneys, Mike LeBeouf and Dale Adams. Therefore, it is proper for your personal attorneys to respond to this motion rather than me.

Southern Guaranty will pay my firm for representing you in the trial of July 20, 1994 and for filing the post

judgment motions that I have discussed with you. However, as I indicated above, it is a conflict of interest for my firm to respond to the enclosed motion. Therefore, please contact your personal attorneys as soon as you receive this letter to discuss whether or not you want to file a response. Your response for or this motion is due by the beginning of next week.

Sincerely,

/s/ Thomas J. Diaz
Thomas J. Diaz

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

JAMES HOWARD SMITH, TRUSTEE
OF THE ESTATES OF MARILYN A.
HANSEN AND LYNNE M. RICE PLAINTIFF

vs. NO. 96-950

LASER, WILSON, BUFFORD & WATTS, P.A.,
SOUTHERN GUARANTY INSURANCE
AND CONTINENTAL CASUALTY INSURANCE
COMPANY DEFENDANTS

AFFIDAVIT OF LYNNE RICE

I didn't find out about the motion to dismiss the negligence count until two days before trial. Nobody from the Laser Firm ever discussed the motion with us or what the consequences were. Tom Diaz did write us saying that Richard Watt would try the case but I never talked to Watt.

I told Tom Diaz if anything we were negligent.

Richard Watt got to the court house at the end of the day and sat with Judge Plegge while the jury was out.

I didn't hire or request Chris Young or Scott Metcalf to hurt Jerry or Brenda Smith.

Nobody went over our testimony before trial. Nobody from the Laser Firm interviewed us before our deposition. No one told us why Mike Alexander was at our deposition asking questions.

When the trial was over and the jury came in we still thought we had coverage for the amount of the verdict because we had one million each and the company had a million dollars. Mr. Diaz never told us that the dismissal of the negligence case destroyed our coverage. We never got a warning by letter or otherwise that if the verdict was in excess of our coverage that it is our problem and we should seek separate counsel.

Mr. Diaz never discussed my testimony with me prior to trial. We were not in control of our case. We wanted him to interview and subpoena our witnesses, Karen Fletcher, Debbie Baker and Steve Henry, but he would not. The only witness he called was Marilyn Hanson. Karen Fletcher and Steve Henry could have testified that they heard Metcalf threaten me, stating that he knew where I lived and where my daughter lived and that he could make my life quite uncomfortable. Both Karen Fletcher and Steve Henry were at the trial but were not called.

No one from Southern Guaranty or Continental Casualty ever interviewed us or took our statements.

/s/ Lynne Rice
LYNNE RICE

Sworn before me this 10 day of March, 1997.

/s/ RDL
R. David Lewis

My commission expires 10/15/00